Fromm/Great Free Speech Cases/Carcieri/Session 6
Commercial Speech

***Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976)**
(Justice Blackmun, for the Court)

F/P: A Virginia statute forbade pharmacists to advertise prices or credit terms for prescription drugs. Since only pharmacists were authorized to dispense such drugs, the law effectively prevented the dissemination of prescription drug price information in the State. Plaintiffs are an individual Virginian who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. The brought suit in federal court to enjoin enforcement of the law. The trial court ruled in their favor, and the USSC granted review.

I: Whether commercial speech is an unprotected category of speech under the First Amendment.
H: No

R: "The protection afforded by the First Amendment is to the communication, to its source and recipients both, (so) where there is a right to advertise, there is a right to receive the advertising."

R: An advertiser does not lose First Amendment protection just because his interest is economic.

R: "The consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Those whom suppression of prescription drug price information hits the hardest are the poor, the sick, and the aged."

R: "Generalizing, society also may have a strong interest in the free flow of commercial information…. Not all commercial messages … contain a great public interest element. Yet there are few to which such an element could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices …."

R: "No line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn…. So long as we preserve a free enterprise economy, the allocation of our resources will in large measure be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."

R: While the State's interest in maintaining professionalism among licensed pharmacists is strong,

1) Virginia's pharmacists are already heavily regulated, and

2) Virginia may not achieve this end through the means of keeping the public ignorant.

R: Although commercial speech is not an unprotected category of speech, it can be regulated to protect the public from false or misleading advertising.

Justice Rehnquist, dissenting:

R: This ruling "elevates (speech) between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage.

The Court speaks of the consumer's interest in the free flow of commercial information … and a predominantly free enterprise economy…. While there is much to be said for this as a matter of desirable public policy, there is certainly nothing in the Constitution which requires Virginia to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. If the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be one only of degree, and not of kind.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decision making in a democracy." I had understood this view to relate to public decision making as to political, social, and other public issues, rather than the decision of a particular individual whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw. But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum….

Under this ruling a pharmacist "might run any of the following representative advertisements in a local newspaper: "Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief." "Can't shake the flu? Get a prescription for tetracycline from your doctor today." "Don't spend another sleepless night. Ask your doctor to prescribe Seconol without delay." Unless the State can show that these advertisements are actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste."

Central Hudson Gas v. Public Service Commission **(1980)**
(Justice Powell, for the Court)

F/P: The New York Public Service Commission (PSC) permitted electrical utilities to engage in "institutional and informational" advertising, yet it prohibited them from engaging in promotional advertising designed to stimulate demand for electricity. The ban continued a policy begun during a time of severe fuel shortage, even though the shortage had ceased. Central Hudson challenged the law on free speech grounds. The State trial and intermediate appellate courts ruled for the PSC, the New York Court of Appeals affirmed, and the USSC granted certiorari.

I: Whether PSC's ban violates the First and Fourteenth Amendments.

H: Yes; the ban fails the four-part test the USSC has developed for commercial speech cases:

1) The speech must concern lawful activity and not be misleading;

2) Ends – the government's interest must be substantial;

3) Means – the law itself must a) directly advance the state interest asserted, and b) be no more extensive than necessary to serve that interest.

R: Although the ban passes parts 1, 2, and 3a of the test, it fails part 3b. That is:

1) There is no claim that the speech in question is inaccurate or concerns unlawful activity;

2) The State's interest in conserving energy is substantial;

3a) Since an immediate connection exists between advertising and the demand for electricity, the law directly advances the State's interest in conserving energy; and/but:

3b) Since the State's interest in conserving energy could be protected adequately by a more limited speech regulation, the ban is more extensive than necessary to serve that interest.

Justice Rehnquist, dissenting

"The Court's analysis is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment.... A public utility is far closer to a state controlled enterprise than is an ordinary corporation....

I also think that New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, to say nothing of enjoy monopoly status, were it not for the laws of New York.

The Court's decision today fails to give due deference to the subordinate position of commercial speech.... (T)his case highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech. I remain of the view that the Court unleashed a Pandora's box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection. The notion that more speech is the remedy to expose falsehood and fallacies in wholly out of place in the commercial bazaar. In a democracy, the economic is subordinate to the political."

44 Liquormart, Inc. v. Rhode Island (1996)

F/P: To promote temperance, Rhode Island banned off premises liquor price advertising. That is, alcohol beverage prices could only be advertised by signs or tags inside liquor stores. A Federal District Court struck the law down, but the Court of Appeals reversed, and the USSC granted certiorari.

H/R: Law struck down; even assuming that promoting temperance satisfies the ends prongs of the Cen*tral Hudson* test, Rhode Island's law bans truthful, non-misleading advertising and fails both means prongs. That is, the law has not been shown to advance temperance, and alternative, less extensive forms of regulation exist to advance the State's interest in temperance, e.g., limitations on per capita purchases, higher alcohol prices through higher taxation, and educational campaigns.